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No. _____

In The

# Supreme Court of the United States

F. LEE BAILEY,

*Petitioner,*

v.

THE FLORIDA BAR,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Florida**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Did the decision of the Supreme Court of Florida to disbar F. Lee Bailey deny him Due Process and Equal Protection by misinterpreting and misapplying established Florida law, failing to guarantee his right to call favorable fact witnesses whose availability was obstructed by agents of the federal government who had an adverse interest in the outcome of the case, refusing to consider the testimony and documentary evidence of those same witnesses in a parallel federal court of claims proceeding, where those witnesses substantially altered their prior testimony, by refusing to consider favorable polygraph evidence, admissible in other Bar cases, and by refusing to consider expert witness testimony, routinely received in other cases, relating to the ethical rules, practices and Bar policies regulating The Florida Bar?

TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

TABLE OF AUTHORITIES ..... iv

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL PROVISION INVOLVED ..... 1

STATEMENT OF THE CASE ..... 2

REASONS FOR GRANTING THE WRIT ..... 9

I. The Florida Supreme Court, in cooperation with the federal Government, denied Petitioner Due Process and Equal Protection of Law, by denying Petitioner's attempts to gain access to a crucial witness employed by the federal Government, and denying Petitioner's attempts to stay the Florida Bar proceedings until such time that he could compel the federal Government to comply ..... 11

II. The Florida Supreme Court ignored Petitioner's claim that he was denied Due Process and Equal Protection of Law, because he was denied the right to present highly relevant expert witness testimony, the like of which had been admitted in prior and subsequent Florida Bar disciplinary hearings ..... 13

III. The Referee in the Florida Bar trial erred in her conclusion that polygraph evidence was inadmissible in a Florida Bar disciplinary proceeding, and this issue having been formally briefed to the Florida Supreme Court, was seemingly ignored in that Court's decision .. 16

TABLE OF CONTENTS – Continued

Page

IV. The Referee's finding that a trust was created, in which Petitioner was the trustee, is an incorrect interpretation and misapplication of established Florida law and as such should have been reversed by the Florida Supreme Court, which was briefed and heard oral arguments, but chose instead to ignore the issue ..... 19

CONCLUSION ..... 30

APPENDIX .....App. 1

## TABLE OF AUTHORITIES

Page

FEDERAL CASES

*City of Miami Firefighters' & Police Officers' Retirement Trust v. Invesco MIM, Inc.*, 789 F. Supp. 392 (S.D. Fla. 1992) ..... 25

*Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786 (1993) ..... 14

*General Electric Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512 (1997) ..... 15

*Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167 (1999) ..... 14, 15

*United States v. Duboc*, 240 F.3d 1076 (11th Cir. Fla. 2000) ..... 2

*United States v. Scheffer*, 523 U.S. 303, 118 S.Ct. 1261 (1998) ..... 18

*Warner v. Florida Bank and Trust*, 160 F.2d 766 (11th Cir. Fla. 1947) ..... 21

STATE CASES

*Amerifirst Federal Savings and Loan Association v. Cohen*, 499 So. 2d 935 (Fla. 3d DCA 1986) ..... 10

*Amerifirst Federal Savings and Loan Association v. Cohen*, 454 So. 2d 626 (Fla. 3d DCA 1984) ..... 9, 10

*Bailey v. Baron*, 269 So. 2d 45 (Fla. 3d DCA 1972) ... 21, 22

*Barber v. Adams*, 208 So. 2d 869 (Fla. 2d DCA 1968) .... 22

*Bay Biscayne Co. v. Baile*, 73 Fla. 112, 75 So. 860 (Fla. 1917) ..... 19, 20

TABLE OF AUTHORITIES – Continued

Page

*Benbow v. Benbow*, 117 Fla. 37, 157 So. 512 (Fla. 1934) ..... 23

*City of Miami Beach v. Miami Beach Fraternal Order of Police*, 619 So. 2d 447 (Fla. 3rd DCA 1993) ..... 12

*Florida Crushed Stone v. Traveler's Indemnity Co.*, 632 So. 2d 217 (Fla. 5th DCA 1994) ..... 12

*Fraser v. Lewis*, 187 So. 2d 684 (Fla. 3d DCA 1966) .. 22, 28

*Geter v. Simmons*, 57 Fla. 423, 49 So. 131 (Fla. 1909) .... 27

*Harvard College v. Amory*, 26 Mass. 446 (1830) ..... 25

*In Re Estate of Herron*, 237 So. 2d 563 (Fla. 1970) .... 21

*Lines v. Darden*, 5 Fla. 51, 1853 WL 1263 ..... 21

*National American Ins. Co. v. Charlotte County*, 611 So. 2d 1284 (Fla. 2nd DCA 1992) ..... 12

*Reid v. Barry*, 112 So. 846 (Fla. 1927) ..... 23

*Robinson v. Horne*, 192 So. 2d 332 (Fla. 1st DCA 1966) ..... 26

*Schwartz v. DeLoach*, 453 So. 2d 454 (Fla. 2nd DCA 1984) ..... 12

*Smehyl v. Hammond*, 44 So. 2d 678 (Fla. 1950) ..... 23

*Sottile v. Mershon*, 166 So. 2d 481 (Fla. 3d DCA 1964) ..... 22

*Stevens v. Hooks*, 125 So. 2d 581 (Fla. 2d DCA 1960) .... 25

*The Florida Bar v. Borja*, 554 So. 2d 514 (Fla. 1990) .... 14

*The Florida Bar v. Carlon*, 2001 WL 1166349 (Fla.) .... 13

TABLE OF AUTHORITIES – Continued

Page

*The Florida Bar v. Hollander*, 607 So. 2d 412 (Fla. 1993) ..... 13

*The Florida Bar v. Lusskin*, 661 So. 2d 1211 (Fla. 1995) ..... 12

*The Florida Bar v. Pavlick*, 504 So. 2d 1231 (Fla. 1987) ..... 16, 17, 19, 29

*The Florida Bar v. Sepe*, 380 So. 2d 1040 (Fla. 1980) ..... 17

*The Florida Bar v. Williams*, 753 So. 2d 1258 (Fla. 2000) ..... 14

*Wade v. Clower*, 94 Fla. 817, 114 So. 548 (1927) ..... 12

*Webster v. St. Petersburg Federal Savings & Loan*, 155 Fla. 412, 20 So. 2d 400 (Fla. 1945) ..... 21

*Weiand v. State*, 701 So. 2d 562 (Fla. 2d DCA 1997) ..... 18

*Williams v. McAdow*, 103 Fla. 644, 137 So. 891 (Fla. 1931) ..... 27

*Wodonos v. Wodonos*, 62 So. 2d 78 (Fla. 1952) ..... 22

*Zuckerman v. Alter*, 615 So. 2d 661 (Fla. 1993) ..... 20

FEDERAL STATUTES

28 U.S.C. § 1257 ..... 1

RULES

**Florida Bar, Rule 4-1.5(a)** ..... 13

**Military Rule of Evidence 707** ..... 18

TABLE OF AUTHORITIES – Continued

Page

TEXTS

Administration of Trusts in Florida (Fla. Bar CLE 3d ed. 2001) ..... 25

Scott's Abridgement of Law of Trusts (Little Brown 1960) ..... 25

## OPINIONS BELOW

The Opinion of the Supreme Court of Florida is reported at 2001 WL 1472608 (Fla.), 26 Fla. L. Weekly S787, and is attached as Appendix A. The Amended Report of Referee is attached as Appendix B.

## JURISDICTION

The Supreme Court of Florida entered final judgment on November 21, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

## CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides that:

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE[1]

The Petitioner, F. Lee Bailey, was an attorney licenced to practice law in the state of Florida until the Florida Supreme Court issued an opinion on November 21, 2001,[2] disbarring him. The circumstances leading to the disciplinary hearing of May-June, 2000, before a Referee, began in April 1994, when Petitioner was retained to be Florida counsel in the case of *United States v. Duboc*, 240 F.3d 1076 (11th Cir. Fla. 2000). (CFC Trial Tr. 42, LL. 17-19; Bar Hearing Tr. 749, L. 20 – 750, L. 20; 1996 Hearing Tr. 236, LL. 14-23). Subsequent to meeting with the Government's attorneys, Petitioner was convinced that a negotiated plea was in the best interests of his client, Claude Duboc. (Bar Hearing Tr. 755, LL. 10-22; 1996 Hearing Tr. 238, LL. 7-24). On April 19,1994, Petitioner, along with

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[1] The history of this litigation involves four judicial proceedings: On February 2nd and 3rd of 1996, there was a hearing on the Government's Emergency Motion to Surrender Property, before Judge Maurice Paul, ("1996 Hearing"); in May, 2000, there was a hearing before a Referee, brought by the Florida Bar against Petitioner in 1996, but which had languished for more than two years after Chief Judge Maurice M. Paul had refused to disclose to the Bar what he recalled – if anything – of a critical meeting with counsel on May 17, 1994. The Bar had applied for an emergency suspension of Petitioner's license in March, 1996, and was rejected by the Florida Supreme Court. The Bar trial before a Referee, was held in May, 2000; in July 2001, a trial was had in the United States Court of Federal Claims, wherein Petitioner sought to recover the value of the Biochem Pharma stock which he was forced to turn over to the Government through the coercion of 44 days imprisonment in 1996 ("CFC Trial"). The oral argument before the Supreme Court of Florida took place on August 30, 2001.

[2] Attached as Appendix A

then co-counsel Robert Shapiro, met with lawyers and a DEA agent of the United States, where discussions were had, *inter alia*, about attorneys' fees. Robert Shapiro broached the subject, querying whether a fee of one million dollars would be considered reasonable for each of the three defense attorneys. The response from the Government agents was in the affirmative. (CFC Trial Tr. 51, LL. 8-17; Bar Hearing Tr. 761, LL. 1-25; 1996 Hearing Tr. 242, LL. 3-7).

On April 25th and 26th, 1994, there were a series of meetings regarding a prospective plea agreement. On April 25, a list was created indicating Duboc's assets that *could* be subject to forfeiture, *if* he agreed to forfeiture. Included in this list were two assets in a bank account in United Bank of Switzerland, Luxembourg: approximately $ 3,500,000.00 in cash, and 602,000 shares of stock in a Canadian pharmaceutical company, Biochem Pharma. (CFC Trial Tr. 54, L. 11 – 56, L. 7; Bar Hearing Tr. 771, LL. 9-23; 1996 Hearing Tr. 243, L. 13 – 244, L. 18). On April 26, 1994 there were a series of four separate meetings dealing with the topic of attorneys' fees. This day, April 26, 1994, is critical to this entire case, and findings as to what occurred then were corrupted by the conduct of the Courts of Florida, as this Petition will explain.

The first meeting occurred when Assistant United States Attorney Greg Miller invited Petitioner into his office, where he indicated that he was very pleased with the way the case was progressing and wanted to protect the Petitioner as to his legal fees. To this end, AUSA Miller suggested a cash asset on the list that had been created by Petitioner and his client the day before, valued at about three and one-half million dollars, and suggested

that it should be exempted from forfeiture, and turned over to Petitioner to cover legal fees and expenses. Petitioner agreed.[3] (CFC Trial Tr. 63, L. 6 – 64, L. 25; Bar Hearing Tr. 775, L. 4 – 778, L. 21; 1996 Hearing Tr. 246, L. 5 – 247, L. 25).

The second meeting occurred immediately following the first, wherein Special Agent Carl Lilley of the Drug Enforcement Agency suggested that, due to the fact that Duboc believed that the value of the Biochem Pharma stock was anticipated to appreciate, and the further fact that the Government would have to liquidate the shares as soon as they were received, thus "dumping", and probably severely depressing their value, it would be a good idea for the Petitioner to take the stock in lieu of the cash account for fees and expenses. (CFC Trial Tr. 65, L. 66, L. 25; Bar Hearing Tr. 786, L. 9 – 791, L. 21; 1996 Hearing Tr. 248, L. 12 – 249, L. 15). AUSA Miller then requested to talk with Petitioner privately, in what was to be the third of four meetings dealing with the fee issue.

AUSA Miller told Petitioner that he was "gambling" by accepting the stock. He explained that if the value of the shares declined to the point where there would not be a sufficient *resource* from which to get his legal fees, Petitioner would be out of luck, because the Government would provide no other asset for that purpose. (CFC Trial Tr. 67, L. 2 – 69, L. 1; Bar Hearing Tr. 791, L. 22 – 796, L.

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[3] It should be noted that this "largesse" was not a major concession by the Government; the United States in 1994 had no cooperative treaty with Luxembourg, and thus no legal way to commandeer these assets.

17; 1996 Hearing Tr. 249, L. 18 – 252, L. 6). Petitioner elected to take this risk.

The fourth meeting occurred with First Assistant U.S. Attorney David McGee, where Petitioner was told that the Government could not "be seen" as setting defense attorney's fees, and that the *ultimate* approval, therefor would come from Chief Judge Maurice M. Paul. Mr. McGee further stated that such a course of action would not be a problem, as the Government would support Petitioner's application to the judge. (CFC Trial Tr. 74, L. 7 – 75, L. 3; Bar Hearing Tr. 800, L. 801, L. 2; 1996 Hearing Tr. 253, L. 15 – 254, L. 17).

Petitioner had, at the second meeting on April 26, 1994, supplied the number to his non-trust bank account (extant since 1992), in Credit Suisse Bank in Geneva, Switzerland to the Government lawyers, who then worked with Duboc to create and telefax a transfer document, which sent the cash to the DEA, and the Biochem Pharma shares to Petitioner's personal account in Geneva. The document contained no language of limitation and was thus, on its face, a transfer in fee simple. (CFC Trial Tr. 69, L. 2 – 71, L. 12; Bar Hearing Tr. 821, L. 3 – 822, L. 9; 1996 Hearing Tr. 256, L. 11 – 257, L. 22). These April 26, 1994 discussions were the last occasion that the stock – or legal fees – were discussed by and between Petitioner and the government until January 11, 1996, when there was a change of counsel hearing; lawyers for the government – for the first time– learned that the BioChem Pharma shares had substantially appreciated in value.

Then – for the first time – the government demanded that the stock be turned over to it, claiming – also for the

first time – that the stock had been given to Petitioner, "in trust." (CFC Trial Tr. 201, L. 8 – 202, L. 22; Bar Hearing Tr. 893, L. 4 – 903, L. 4). In February 1996, Judge Paul convened a series of hearings, where the Petitioner was ordered, *inter alia*, to return the stock to the Court; and later, the repayment of certain expenses (over $400,000.00), which the Court had "disallowed." Petitioner, being unable to completely comply with Judge Paul's initial orders in the time allowed, was jailed on contempt charges for 44 days. (Bar Hearing Tr. 940, L. 946, L. 13; 1996 Hearing).

A complaint was filed with the Florida Bar in March 1996, accusing Petitioner with various violations of the Rules Regulating the Florida Bar. The investigation remained stagnant for two years until a claim filed by Petitioner – *at the suggestion of the government*[4] – in the United States Court of Federal Claims, demanding that the value of his stock be returned to him, survived a motion to dismiss, and was ordered to trial.

In May-June 2000, a hearing was held on the disciplinary charges, in which Petitioner was denied access to critical testimony from Government lawyers[5], was denied

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[4] Petitioner had filed in the District Court to establish his property rights to the stock, or at least its increased value. The government responded by saying that such a claim belonged in the United States Court of Federal Claims. When Petitioner followed this suggestion, Judge Paul attempted – in a *sua sponte* order – to deny Petitioner access to any court in the United States, even though he clearly had no jurisdiction to do so.

[5] See letter to Assistant Attorney General Robinson, dated April 6, 2000, requesting permission to depose Mary Lee Warren, attached as Appendix E, and the letter from AUSA

a stay until such time as the Court of Federal Claims trial, which was substantially dealing with the same issues, (and wherein that critical testimony could be – and indeed was – compelled – could be concluded[6]), and was denied the admission of crucial, favorable expert testimony. Upon conclusion of the Disciplinary hearing, the Referee recommended that Petitioner be permanently disbarred from the practice of law in the state of Florida[7].

In July 2001, the Court of Federal Claims trial commenced. Here, much of the testimony denied the Petitioner in the Bar hearing was heard.[8] Additionally, much

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Petrie, dated June 23, 2000 (*after Petitioner's Bar trial was over)* denying permission to depose Mary Lee Warren, attached as Appendix F.

[6] See Emergency Motion for Abatement or Stay, dated May 24, 2000, attached as Appendix G, Supplement to Emergency Motion for Abatement or Stay, attached as Appendix H, and the Supreme Court of Florida's denial of Motions for Abatement or Stay, dated May 26, 2000, attached as Appendix I.

[7] See Amended Report of Referee, attached as Appendix B.

[8] AUSA Kirwin testified that, based upon the "recently recovered" notes that he had taken during the May 17, 1994, chambers conference before Judge Paul, which notes had not been "available" during the Florida Bar hearing, he does not recall the word "trust" being used. (Tr. 592, L. 20 – 594, L. 2); Justice Department lawyer Samuel testified at the Court of Federal Claims trial that AUSA Kirwin *never told her* that Petitioner was holding the stock in trust. (Tr. L. 17). Additionally, she testified that AUSA Kirwin told her that assets were going to be exempted from forfeiture. (Tr. 447, LL. 10-13). AUSA Samuel in her deposition taken *after the conclusion* of the Florida Bar hearing testified to the following: She learned in 1994 that the U.S. Attorney's Office was going to seek to exempt from forfeiture the Biochem Pharma stock (Tr. 14, LL. 9-13); that AUSA's McGee, Hankinson or Kirwin never told her the stock

of the testimony of those who appeared against the Petitioner at the Bar hearing, changed[9] to such an extent that, based upon the more recent testimony, the Referee could not have found, by clear and convincing evidence, against the Petitioner.

This evidence was offered to the Florida Supreme Court[10] in the form of a transcript of the Court of Federal

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was given in trust (Tr. 12, L. 8 – 13, L. 8); and that AUSA Kirwin told her that eight hundred thousand dollars of otherwise forfeitable property would be set aside to support the French properties (Tr. 41, LL. 11-22). Mary Lee Warren, who was the Deputy Assistant Attorney General, in a deposition that was taken after the Florida Bar hearing, maintained that she had no knowledge of any arrangements between Petitioner and the Government.

[9] Edward Shohat testified in the Court of Federal Claims trial that he did not recall whether AUSA Kirwin or anyone else, during the pre-plea conference in Judge Paul's chambers, ever used the word "trust." (Tr. 1448, L. 15 – 1450, L. 5). But during the Bar hearing Shohat was quite sure that a "trust" was agreed upon. Carl Lilley testified during the Court of Federal Claims trial that he never heard the word "trust" used in connection with the stock until 1996. (Tr. 905, L. 21 – 906, L. 4). AUSA Kirwin testified in the Court of Federal Claims trial that AUSA Miller, in discussing the Bio Chem stock, never used the words "trust" or "trustee." (Tr. 563, LL. 1-25). This was markedly different from the testimony in the Bar hearing. AUSA Atchison in the Court of Federal Claims trial testified that he does not recall Duboc instructing the transfer of the stock be in trust, nor does he recall any of the AUSA's using the word trust in relation to the transfer of the Biochem stock. AUSA Atchison further testified that he did not hear the word "trust" in this context until either late 1995, or early 1996. (Tr. 1092, L. 12 – 1093, L. 4). This testimony was not given during the Florida Bar hearing.

[10] Copy of Motion to submit the Court of Federal Claims transcript, attached as Appendix C.

Claims trial, for consideration on Petitioner's appeal, but was refused[11].

Petitioner's counsel during oral arguments in the Florida Supreme Court erred on a material issue. When questioned by Justice Wells as to whether the stock fund was received as fees, counsel mistakenly averred that they were not. This was clear error on a material issue, as the record of the previous proceedings all show Petitioner as claiming that the stock was received as fees.[12]

## REASONS FOR GRANTING THE WRIT

The Petitioner has been denied his Fourteenth Amendment rights to Due Process and Equal Protection of the Law by the Florida Supreme Court's refusal to consider after-discovered evidence that was clearly unavailable during the Bar trial, and which greatly undermines the findings of fact of the Referee.

The facts in the instant case are similar to those in *Amerifirst Federal Savings and Loan Association v. Cohen*, 454 So. 2d 626 (Fla. 3d DCA 1984). In *Amerifirst*, the creditor and debtor in a mortgage foreclosure action

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[11] Copy of the Florida Supreme Court Order, denying permission to submit the Court of Federal Claims transcript, attached as Appendix D.

[12] During the hearing before Judge Paul on February 2, 1996, Petitioner testified that he had received the stock for legal fees. (Tr. 74, LL. 4-5). Petitioner, in the Florida Bar hearing, said that the stock was his fee. (Tr. 796, LL. 12-17). Petitioner, in the Court of Federal Claims trial, referred to the stock as being in the form of legal fees. (Tr. 313, L. 17 – 317, L. 17).

entered a settlement agreement. The settlement agreement was " . . . [1] entered into by sophisticated and knowledgeable business persons [2] in an arms-length transaction [3] in which both parties received considerable benefits. . . . " *Amerifirst*, 454 So. 2d at 627. As the situation developed subsequent to the agreement, the creditor stood to make a profit of over four million dollars beyond being paid for the underlying indebtedness, with interest, attorneys fees, and costs. The appellate court upheld the settlement agreement and profit, and observed:

> . . . making a handsome profit on any agreement, due to events subsequent to the agreement, hardly renders the enforcement of the agreement unconscionable or the provisions in question a forfeiture. Cohen [debtor] gained much from this agreement and cannot now be permitted to back out of those provisions of the agreement which he deems harsh or onerous. [citations omitted].

*Amerifirst*, 454 So. 2d at 627. This language was repeated and reaffirmed in the subsequent appeal between the same parties, see *Amerifirst Federal Savings and Loan Association v. Cohen*, 499 So. 2d 935 (Fla. 3d DCA 1986).

**I. The Florida Supreme Court, in cooperation with the federal Government, denied Petitioner Due Process and Equal Protection of Law, by denying Petitioner's attempts to gain access to a crucial witness employed by the federal Government, and denying Petitioner's attempts to stay the Florida Bar proceedings until such time that he could compel the federal Government to comply.**

The Petitioner was denied Due Process and the Equal Protection of the Law, due to the federal Government's obstruction of his attempt to gain access to Mary Lee Warren, a federal Government employee, so as to be able to take her deposition, prior to the commencement of the Florida Bar hearing.[13] The federal Government obstructed this request, which had been properly presented under the regulations, refusing to reply until June 23, 2000, well after the conclusion of the Bar proceeding.[14] Mrs. Warren's testimony, in a deposition taken *after* the conclusion of the Bar proceeding, demonstrated that, she in her capacity as Deputy Assistant Attorney General, was unaware of any "trust" relationship existing between the federal Government and Petitioner.

The Florida Supreme Court, in denying Petitioner's Motion for Abatement or Stay[15], abused its discretion, in

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[13] See the letter to Assistant Attorney General Robinson, dated April 6, 2000, requesting permission to depose Mary Lee Warren, attached as Appendix E.

[14] See the letter from AUSA Petrie, dated June 23, 2000, denying permission to depose Mary Lee Warren, attached as Appendix F.

[15] See Motion for Abatement or Stay, attached as Appendix G, and Supplement to Motion for Abatement or Stay, attached as Appendix H.

that there was then pending, the U.S. Court of Federal Claims trial, which was to deal with the same issues as those before the Referee *and*, where there was power to compel the obstructed testimony.[16] Petitioner had filed his U.S. Court of Federal Claims action on October 22, 1996, while the Bar's complaint was not filed until October 1999. Florida case law has held it to be an abuse of discretion, to refuse to stay a subsequently-filed state court action, in favor of a previously-filed federal action, which involves the same parties and the same or substantially similar issues. *See, Florida Crushed Stone Co. v. Traveler's Indemnity Co.*, 632 So. 2d 217, 220 (Fla. 5th DCA 1994) (Citations omitted). *See also e.g., City of Miami Beach v. Miami Beach Fraternal Order of Police*, 619 So. 2d 447 (Fla. 3rd DCA 1993); *National American Ins. Co. v. Charlotte County*, 611 So. 2d 1284, 1285 (Fla. 2nd DCA 1992); *Schwartz v. DeLoach*, 453 So. 2d 454, 455 (Fla. 2nd DCA 1984), *citing Wade v. Clower*, 94 Fla. 817, 114 So. 548, 551 (1927). Judicial economy, and fundamental fairness concerns, strongly support the notion that the stay should have been granted, at least until the conclusion of the Court of Federal Claims trial. The Florida Supreme Court denied the motion.[17]

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[16] The Florida Supreme Court in *The Florida Bar v. Lusskin* 661 So. 2d 1211 (Fla. 1995), held, that a Referee in a disciplinary hearing has discretion to abate the proceeding for good cause. In *Lusskin*, an abatement was granted pending the appeal of an attorney's criminal conviction. The Court averred that, if the conviction was reversed, "any time spent on disbarment proceedings would have been wasted." *Id.*, at 1213.

[17] See Florida Supreme Court's order denying Motion for Abatement or Stay, attached as Appendix I.

**II. The Florida Supreme Court ignored Petitioner's claim that he was denied Due Process and Equal Protection of Law, because he was denied the right to present highly relevant expert witness testimony, the like of which had been admitted in prior and subsequent Florida Bar disciplinary hearings.**

The Petitioner was denied Due Process and the Equal Protection of the Law because he was precluded from providing the testimony of the Petitioner's expert witness of the former Ethics Director of the Florida Bar, Timothy Chinaris[18], a form of evidence previously recognized in other Bar proceedings in Florida[19]. This Court has held

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[18] The Referee ruled that she did not need to hear this testimony because, all attorneys admitted to the Florida Bar are deemed to be experts on the rules of ethics. (Fl.Bar Tr.617, L. 3 – 619, L. 3.). However, Mr. Chinaris was prepared to testify as to how the Florida Bar viewed – *on policy grounds* – such matters as those contained in the complaint, based upon his experience as the Ethics Director of The Florida Bar during the time period of 1989 – 1997, which is the same time period of the alleged violations. (See Resume of Timothy Chinaris, attached as Appendix M).

[19] The Florida Supreme Court has ruled that, an expert witness of the Florida Bar, who had extensive experience in the subject matter in question, was properly allowed to testify by the Referee. *The Florida Bar v. Hollander*, 607 So. 2d 412, 414 (Fla. 1993). Additionally, expert testimony has been allowed as to what might be called the "ultimate issue," whether the respondent committed violations concerning the rules of ethics. In the case of *The Florida Bar v. Carlon*, 2001 WL 1166349 (Fla.), the referee allowed the Bar's expert witness to testify as to whether the respondent had violated the rules of ethics, by allowing him to opine that "any fee over $6000 would be clearly excessive." The concept of a "clearly excessive" fee appears only in the attorney disciplinary rules of the Florida Bar, Rule

that the standard by which expert testimony is to be admitted is enunciated in this Court's case of *Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167 (1999).[20]

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4-1.5(a). Here the referee allowed expert testimony on the rules of ethics. Again, in *The Florida Bar v. Williams*, 753 So. 2d 1258, 1261 (Fla. 2000), the referee allowed the Bar's chief auditor to testify as to whether the respondent violated the rules of ethics by saying, "[respondent] was not in compliance with the rules governing trust accounts." Furthermore, both the Bar's and respondent's experts were allowed to testify as to whether the respondent complied with the rules regulating attorney trust accounts. *The Florida Bar v. Borja*, 554 So. 2d 514 (Fla. 1990).

[20] In *Kuhmo Tire Co.*, the Court held, relying on its prior holding in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786 (1993), that:

> We conclude that *Daubert's* general principles apply to the expert matters described in Rule 702. The rule, in respect to all such matters, "establishes a standard of evidentiary reliability." 509 U.S. ___, at 590, 113 S.Ct. 2786. It "requires a valid . . . connection to the pertinent inquiry as a precondition to admissibility." *Id.*, at 592, 113 S.Ct. 2786. And where such testimony's factual basis, data, principles, methods, or their application are called sufficiently into question, . . . the trial judge must determine whether the testimony has "a reliable basis in the knowledge and experience of [the relevant] discipline." 509 U.S. at 592.

Taking this holding step by step, it is clear that Chinaris' testimony had a "valid . . . connection to the pertinent inquiry", that his testimony went to the heart of the Bar's case and the Respondent's defense. Thus, Judge Ellis was required to find whether Chinaris had the requisite experience to testify as an expert based on his "knowledge and experience of [the relevant] discipline." There can be little doubt that as the former Ethics Director of the Florida Bar, Chinaris possessed the requisite credentials and knowledge to be considered an expert witness

That testimony would have sharply undermined a number of the unfavorable findings of the Referee.[21] The Florida Supreme Court chose to remain silent on this issue, even though it was preserved and briefed.[22]

The fact finding process of the Florida Courts was flawed to such an extent, as to deny the Petitioner Due Process and Equal Protection of the Law. The Petitioner was precluded from putting forth credible and significant favorable evidence in Florida, due to the federal Government's obstruction of Petitioner's access to key witnesses, as well as the unwarranted and prejudicial exclusionary rulings of the Referee. The U.S. Court of Federal Claims, which heard the case on a breach of contract theory, dealing with virtually the same issues, compelled this evidence and a decision, yet to be handed down, based upon the comments from the bench[23], Petitioner believes will be much more favorable to the Petitioner, casting a shadow over the credibility of the Florida decision.

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qualified to testify in the instant proceedings. The Court went on to say that an abuse of discretion standard is proper when reviewing the trial court's decision regarding the admission of expert testimony. *Kuhmo Tire Co.*, at 138, citing *General Electric Co. v. Joiner*, 522 U.S. 136, 138-139, 118 S.Ct. 512 (1997). Accordingly, Judge Ellis clearly abused her discretion when she refused to allow this expert testimony.

[21] Timothy Chinaris' Answers to Interrogatories, Fla. Bar proceeding, attached as Appendix N.

[22] Petitioner's Initial Brief in The Supreme Court of Florida, page 48, attached as Appendix O.

[23] Excerpt of Judge Horn's closing comments from the bench during the U.S. Court of Federal Claims trial, attached as Appendix P.

**III. The Referee in the Florida Bar trial erred in her conclusion that polygraph evidence was inadmissible in a Florida Bar disciplinary proceeding, and this issue having been formally briefed to the Florida Supreme Court, was seemingly ignored in that Court's decision.**

The Petitioner was denied Due Process and Equal Protection of the Law by the Florida Courts in their refusal to consider polygraph evidence, which had been accepted in prior proceedings, involving other lawyers similarly situated. The Petitioner sought to admit the results of his own polygraph[24], which established that he was truthful with respect to his recollection of the stock transfer to him. Additionally, the Petitioner sought to introduce polygraph testimony establishing that his pilot, Joaquin "Pete" Fuster, who had been present in Judge Paul's chambers, was not deceptive when he said that he did not hear the word "trust" mentioned by anyone at the May 17, 1994 pre-plea conference.[25] (Tr. 721). The Referee commented that Petitioner's polygraph report was tardy, "[s]o I'm inclined just to exclude that on a procedural ground" (Tr. 723). Secondly, the Referee denied the Fuster polygraph evidence, based upon her erroneous belief that, "in Florida, polygraph testimony is not admissible." (Tr. 724).

Polygraphs have been considered in Florida Bar proceedings. See *The Florida Bar v. Pavlick,* 504 So. 2d 1231,

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[24] Copy of polygraph report on F. Lee Bailey, attached as Appendix Q.

[25] Copy of polygraph report on Joaquin Fuster, attached as Appendix R.

1233 (Fla. 1987). *See also The Florida Bar v. Sepe*, 380 So. 2d 1040 (Fla. 1980), in which the Florida Bar's Petition for Approval of Conditional Guilty Plea, related that the results of polygraphs which were administered by both the prosecution and the defense, to the respondent, demonstrated that, "neither of them showed reaction indicative of deception." *Id.*

The Referee in the case at bar, refused to recognize *Pavlick*, finding it to be distinguishable. (Tr. 724). Pavlick's polygraph evidence turned on whether he was telling the truth when he denied in the Bar proceeding that he was guilty of being an accessory after the fact to a misprision of a felony, despite his federal *Alford* plea and adjudication of guilt as to the crime. The polygraph test introduced in the Bar proceeding, "bore out Pavlick's testimony" that he did not commit the crime. 504 So. 2d at 1233. The Court held that, "due process" supported the referee's decision to admit the polygraph results as, "evidence in mitigation." *Id.* at 1234. Here, due process required consideration of the polygraph evidence as to the merits *and* mitigation. Additionally, Justice Ehrlich commented in *Pavlick* (in his dissenting opinion) that, " . . . testimony of a witness who administered a polygraph test to respondent, which evidence, while **admissible in a bar proceeding . . .** " *Id.* at 1235 (*emphasis added*). Had the proffered polygraph evidence been accepted, it would have demonstrated that the Respondent's recollection on the principal issue in the entire case was truthful, in that there was no talk of trusts with AUSA Miller (who refused a polygraph test, along with Patterson and Shohat), on April 26, 1994. No reason has been given why

Petitioner was denied equal protection in this case[26], indeed, the Florida Supreme Court chose not to deal with the issue at all.

This Court addressed the polygraph issue in *United States v. Scheffer*, 523 U.S. 303, 118 S. Ct. 1261 (1998), and upheld Military Rule of Evidence 707, prohibiting polygraph evidence in courts-martial. But three justices joined in Justice Kennedy's concurrence:

> I doubt, though, that the rule of *per se* exclusion is wise, and some later case might present a more compelling case for introduction of the testimony than this one does. . . . And, as Justice Stevens points out, there is much inconsistency between the Government's extensive use of polygraphs to make vital security determinations and the argument it makes here, stressing the inaccuracy of these tests.

*Id.* at 318, 118 S. Ct. at 1269 (Kennedy, J., concurring). Thus, combined with Justice Stevens' dissent, five justices believe it unwise to *per se* exclude polygraph evidence.

Whatever the ultimate answer may be as to the use of polygraphs in all cases, the denial of its use here violated the Petitioner's due process right to present evidence in mitigation, which may have been a significant factor in

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[26] Judge Ellis ruled that she was going to exclude the proffered polygraph evidence on procedural grounds, because it was submitted too late. (Fla. Bar Tr. 723). However, the District Court of Appeal of Florida, Second District, held that the exclusion of a witness due to his late disclosure was inappropriate. *Weiand v. State*, 701 So. 2d 562 (Fla. 2d DCA 1997). Here, the distinction between a witness and a piece of evidence cannot fairly be made.

the Referee's deliberations. *Pavlick, supra* at 45. While we contend that the polygraph evidence as to either examinee, Petitioner or Fuster, contradicts Referee's finding of a "trust," the exclusion of the polygraph evidence here was a serious error because, it could and should have tipped the "clear and convincing evidence" scale in the Petitioner's favor, particularly in a case so governed by credibility judgments.

**IV. The Referee's finding that a trust was created, in which Petitioner was the trustee, is an incorrect interpretation and misapplication of established Florida law and as such should have been reversed by the Florida Supreme Court, which was briefed and heard oral arguments, but chose instead to ignore the issue.**

The issue of whether a trust was created must be analyzed under the laws of Florida, because the attorneys involved were all Florida lawyers, dealing with an asset worth almost six million dollars. The Government contends that, Petitioner held the stock under an "oral trust" for the benefit of the Government. Under a trust, a "settlor" or "grantor" transfers property to a "trustee" or "grantee" who holds the property for the benefit of a "beneficiary." The elements of a trust are (1) the trust res (the property transferred by the settlor) and (2) the holding of title of the trust res by one person (the trustee) for the benefit of another (the beneficiary). *Bay Biscayne Co. v. Baile*, 73 Fla. 112, 75 So. 860, 868 (Fla. 1917). In the instant case, the Government contends that Duboc is the settlor, Bailey is the trustee, and the Government is the beneficiary.

While the word "trust" is not always required, the words used must be "sufficient to create a trust." *Zuckerman v. Alter*, 615 So. 2d 661 (Fla. 1993). Here the transfer document does not contain the word "trust," nor any restrictions or conditions. In fact, the transfer document[27] also contains directions to transfer other property to an account for the Government, which property was forfeited to the Government (i.e., not held in trust). The transfer document does not mention that there is a "trust" of any kind regarding either transfer. The transfer document, and related circumstances, are not consistent with an oral trust, but rather with an outright conveyance to Petitioner.

Besides the presence of the elements of a trust (discussed above), there are certain matters requisite to actually create such a trust, and these must be set forth with reasonable certainty. *Bay Biscayne Co. v. Baile*, 73 Fla. 112, 75 So. 860, 868 (Fla. 1917). Given the presence of several government attorneys familiar with Florida law, the absence of these requisites is significant.

There must be a sufficient declaration of trust which (1) evinces an intention to create a trust and (2) sets out the trust property, terms, and parties. Alternatively stated, there must be (1) sufficient words to raise the trust, (2) a definite subject-matter, and (3) a certain and ascertained object.

> For the purpose of proving the trust relationship the evidence must be clear and **unmistakable**

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[27] Copy of Biochem Pharma stock transfer document, attached as Appendix J.

> **both** as to the intent to create the trust **and** as to the execution of that intent. [citation omitted] The acts or words relied on must be **unequivocal**, implying that the person holds the property as trustee for another.

*Webster v. St. Petersburg Federal Savings & Loan*, 155 Fla. 412, 20 So. 2d 400, 402 (Fla. 1945) (*emphasis added*). "[T]here must be **certainty** as to the parties who are to take, and what they are to take." *Lines v. Darden*, 5 Fla. 51, 1853 WL 1263, at 10 (*emphasis added*). It is the intention of the settlor and trustee that is relevant, not the intention of a beneficiary, in the creation of a trust. *e.g., Warner v. Florida Bank & Trust Co.*, 160 F.2d 766 (11th Cir. Fla. 1947); *In re Estate of Herron*, 237 So. 2d 563 (Fla. 1970). No credible or admissible evidence as to the intention of Duboc has been presented. Petitioner has presented evidence as to his intention in accepting the conveyance of the stock. Considering the evidence of the intention of Duboc and Petitioner, there is no oral trust. AUSA Miller's contention that the purpose of the trust was to allow the Government to benefit from the appreciation of the stock, is contradicted by Petitioner and AUSA Kirwin, in that Petitioner had the right to sell the stock at his discretion.

An "oral trust" of personal property can be created (1) by parol or (2) partly in writing and partly by parol. However, the courts of Florida are cautious in recognizing trusts created entirely by parol. *Bailey v. Baron*, 269 So. 2d 45, 47 (Fla. 3d DCA 1972), [and cases cited therein]. "The acts or words relied on must be unequivocal, implying that the person holds the property as trustee for another." *Webster v. St. Petersburg Federal Savings & Loan*,

155 Fla. 412, 20 So. 2d 400, 402 (Fla. 1945). "If the court establishes a trust out of uncorroborated parol testimony, it will take property from the lawful holder solely because of unsubstantiated words." *Bailey, supra,* at 49. The intent to create a trust is found in the mind of the settlor, and the intent to accept property and serve as trustee is in the mind of the trustee. *See, e.g., Barber v. Adams,* 208 So. 2d 869 (Fla. 2d DCA 1968); *Wodonos v. Wodonos,* 62 So. 2d 78 (Fla. 1952) (" . . . nor is it suggested that the grantee had been informed in any fashion whatsoever that a trust was intended, or that she was accepting a conveyance of real estate subject to a beneficial interest in another." *Id.,* 79). If the Government is to be considered the settlor, then the question of why none of the Government lawyers prepared trust documents or even used the word "trust" in relation to the Biochem Pharma stock is critical.

Under Florida law, the party seeking to prove the trust, has the burden of proof as to the existence of an express trust. *Fraser v. Lewis,* 187 So. 2d 684 (Fla. 3d DCA 1966). In order to establish an oral trust, the evidence must be so clear, strong and unequivocal as to remove every **reasonable doubt** as to the existence of a trust. *Sottile v. Mershon,* 166 So. 2d 481 (Fla. 3d DCA 1964). This is the strongest burden of proof found in civil matters. Given this state of the law, the failure of the AUSA's, who were Florida attorneys, to create written documentation of the trust is an inference that weighs heavily against the Government's position. The evidence tendered by the Government falls far short of meeting the burden set forth above.

Beyond the Government's failure to present evidence that is so clear, strong and unequivocal, as to remove every reasonable doubt as to the existence of a trust and the terms of such a trust were, other elements also weigh against the Government. Florida law recognizes that if there is a document conveying the property, it is accorded great weight when considering parol evidence on the issue of the existence of an oral trust. "The determination whether a trust exists different from the **terms in which the conveyance vests the title** depends upon the intention of the parties [*i.e.*, grantor and trustee] at the time the instrument is executed." *Benbow v. Benbow*, 117 Fla. 37, 157 So. 512, 516 (Fla. 1934). The transfer document here, contains no restrictions or conditions. In fact, the transfer document also contains directions to transfer other property to an account for the Government, which property was forfeited to the Government (*i.e.*, not held in trust). The transfer document does not mention that there is a "trust" of any kind regarding either transfer. The transfer document is consistent with an outright conveyance, not in trust, to Petitioner. As stated by the Florida Supreme Court:

> A trust may be created by the execution of a conveyance in trust. The conveyance, however, must contain the essential elements of a trust. One of these so-called essentials is an intention of the settlor specifically to create a trust and not to do something else. [Citation omitted]. With respect to the instrument before us, the only intent, as shown by all the evidence, to be existent in the mind of the grantor, purported settlor X, was the intent to transfer the property.

*Smehyl v. Hammond*, 44 So. 2d 678 (Fla. 1950).

The instrument of conveyance in the instant case, likewise shows no intent of Duboc to create a trust, whereas other documents, unrelated to the subject stock, created by the Government and signed by Duboc, show such intent by utilizing the word "trust" or "trustee", in regard to the relationship with Petitioner[28].

Other legal principles support the conclusion of an outright conveyance to Petitioner. The Court in *Reid v. Barry*, 112 So. 846 (Fla. 1927), held: (1) A deed must be construed most strongly against the grantor, and most favorably to the grantee; (2) A deed absolute on face, based on consideration, conveys fee-simple title to the grantee; (3) Absolute control and power of disposition are inconsistent with the idea of a trust; and (4) parol evidence will not be heard to engraft a trust on a conveyance which is absolute in its terms.

Virtually all the facts in the instant case are inconsistent with a trust relationship. For example:

1. The asset (*i.e.*, speculative stock) is not an appropriate trust asset. "Gambling" with the res of a trust is not appropriate for a trustee. Yet this is how AUSA Miller describes his conversation with Petitioner in relation to the Biochem Pharma stock.

The concept of "gambling" with an asset is anathema to the concept of a trust. A speculative investment is not appropriate to be held as a trust asset.

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[28] Two asset transfer documents (Shaw Chuen & Sai Yuk), attached as Appendix K and L.

> All that can be required of a trustee to invest, is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, **not in regard to speculation**, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested.

*Harvard College v. Amory*, 26 Mass. 446, 461 (1830) (*Emphasis added*)

Florida paraphrased *Harvard* in its adoption of the prudent man rule for investment by fiduciaries adopted in 1953, see Section 518.11, Florida Statutes (1992) ("in the management of their own affairs, **not in regard to speculation**, but in regard to. . . . "). Although Section 518.11 was amended effective 1993, speculation remains unauthorized for a trustee. *See* Section 2.16, *Administration of Trusts in Florida* (Fla. Bar CLE 3d ed. 2001) [Also see discussion of *City of Miami Firefighters' & Police Officers' Retirement Trust v. Invesco MIM, Inc.*, 789 F. Supp. 392 (S.D. Fla. 1992), where a retirement trust sued its investment advisor, seeking damages under a tort theory for "**speculating in the stock of** Texas Air." *Id.* at 393. The court dismissed the tort action, but noted that the retirement trust could seek recovery through a claim for breach of contract.]. One noted commentator has included "**speculative shares of stock**" as a kind of investment which is universally condemned as a trust investment. *See* Section 227.6, *Scott's Abridgment of the Law of Trusts* (Little Brown 1960). Florida courts have consistently held the same. *Stevens v. Hooks*, 125 So. 2d 581, 582 (Fla. 2d DCA 1960)

(*Emphasis added*) (It is improper for a fiduciary to purchase "**highly speculative stocks.**").

2. An arrangement for a trustee to hold a speculative stock, and not be liable for its decline, is inconsistent with a trustee's obligation.

In a trust arrangement, if a trustee holds, or invests in, speculative stock, and there is a loss, the trustee is liable for the loss as a violation of his fiduciary investment duty. If the agreement is that the alleged trustee is not liable to the alleged beneficiary for a loss incurred from a speculative investment, it is not consistent with a fiduciary relationship, and is proof of the absence of a trust relationship. Here, AUSA Miller did not expect Petitioner to reimburse any loss of value, but rather that Petitioner should suffer the loss himself, even to the extent of not being able to receive a fee or to be reimbursed for funds expended on the maintenance of the properties.

3. Incurring personal liability to guarantee a loan on behalf of a trust is inconsistent with the obligations of a trustee. Trustees simply do not incur personal liability for a loan on behalf of a trust.

4. Having a complicated agreement involving a six million dollar asset, and not having it reduced to writing by a party who now asserts the existence of the complicated agreement, is not consistent with prudent business standards in today's society.

Equity has exclusive jurisdiction over suits to establish trusts. *Robinson v. Horne*, 192 So. 2d 332 (Fla. 1st DCA 1966). Equity views with disfavor suits brought long after

transactions have occurred, and after a party has relied to his detriment on the apparent situation. *Williams v. McAdow*, 103 Fla. 644, 137 So. 891 (Fla. 1931).

An equitable principle that applies in the instant case is appropriately stated as follows:

> No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith, and reasonable diligence, but will discourage stale demands for the peace of society, by refusing to interfere where there have been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred."
>
> . . . .
>
> In other words, where a court of equity finds that the position of the parties has so changed that equitable relief cannot be afforded without doing injustice, . . . it will not exert its equitable powers in order to save one from the consequences of his own neglect.

*Geter v. Simmons*, 57 Fla. 423, 49 So. 131, 133 (Fla. 1909) (Citations omitted).

Petitioner represented Duboc in a drug prosecution brought by the Government. Discussions involving Duboc, Petitioner, and the Government eventually resulted in a plea agreement by Duboc, and a transfer of stock to Petitioner, to insure that there would be an asset for Petitioner's fees and costs, so that he would agree to continue to represent Duboc throughout the anticipated extended activities to follow the plea agreement. While Petitioner and the Government disagree as to the exact arrangement regarding this stock, they do agree that the

transfer was to provide for Petitioner's fees and costs and, to induce him to continue in the case. Petitioner applied for and was granted a line of credit against the shares, with the full knowledge of the Government, conditioned on Petitioner providing personal guarantees in case the stock collapsed too quickly to be liquidated. For months, the Government induced Petitioner to continue in the case, provide services, exercise complete control over the stock, and incur personal liability. These circumstances raise an estoppel against the Government to now assert the existence of an oral trust.

The Government owes a duty of fair dealing with its citizens and contractors. What should the Government, as a matter of fair dealing and as a matter of ordinary business prudence, have done if they believed a trust was to be established? The Government, as the party alleging the existence of an oral trust, has the burden of proof to show an oral trust. *Fraser v. Lewis, supra.* The Court can consider all the circumstances, including the standard of conduct which should be expected of Government agents in dealing with the public, including opposing attorneys. If it was the Government's requirement that there be a complicated arrangement regarding an asset that started out being worth approximately six million dollars, it had many opportunities to memorialize that specific arrangement in writing, and to communicate that understanding to Petitioner in writing.

The Government has not shown that at the time of the creation of the alleged oral trust, that a trust was intended by Duboc and Petitioner. The Government's proof does not show certainty as to the existence of an

alleged trust, its terms, or its beneficiaries. The Government's proof comes nowhere near removing every reasonable doubt as to the existence of a trust. Accordingly, the Court below erred in it's interpretation and application of Florida law, as to a material issue, in concluding that a trust had been formed, with Petitioner acting as a trustee.

At many points along the way, the Government could have done things to avoid the present situation, but the Government failed. The Government did *not* include the "trust" arrangement in the plea agreement, or the transfer document, or by a separate written agreement, or by letter or memo. These are things that an ordinary business person does as a matter of prudence. Petitioner, functioning under his own understanding and intent, and his understanding of the intent of Duboc, accepted the conveyance of stock as an outright conveyance, not in trust. Petitioner stayed in the case, and incurred personal liability regarding a loan on the stock. Beyond the Government's failure to prove an oral trust, the circumstances also raise an estoppel against the Government to even try.

As demonstrated above, history supports the inference that when the Florida Bar wishes to use expert witnesses, it is allowed to do so. As in *Pavlick* and the polygraph issue, a new set of rules appears to have been created by the Florida Supreme Court discriminating against Petitioner, and thus contaminating the fact-finding process.

## CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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## APPENDIX


A. Supreme Court of Florida Decision .....App. 1

B. Amended Report of Referee .....App. 25

C. Motion to Submit Court of Federal Claims Transcript to Supreme Court of Florida ....App. 65

D. Supreme Court of Florida denial of Motion to Submit Court of Federal Claims Transcript...App. 72

E. Letter to Assistant Attorney General Robinson, dated April 6, 2000, requesting permission to depose Mary Lee Warren .....App. 73

F. Letter from AUSA Petrie, dated June 23, 2000, denying request to depose Mary Lee Warren.....App. 79

G. Emergency Motion for Abatement or Stay, dated May 24, 2000 .....App. 83

H. Supplement to Emergency Motion for Abatement or Stay, dated May 25, 2000.....App. 95

I. Supreme Court of Florida's denial of Motions for Abatement or Stay.....App. 98

J. Biochem Stock Transfer Document .....App. 99

K. Shaw Chuen Transfer Document.....App. 100

L. Sai Yuk Transfer Document.....App. 101

M. Timothy Chinaris Resume .....App. 102

N. Timothy Chinaris Answer to Interrogatories.....App. 110

O. F. Lee Bailey's initial Brief to Supreme Court of Florida .....App. 115

P. Excerpt of Judge Horn's Comments from Court of Federal Claims Trial.....App. 168

Q. F. Lee Bailey's Polygraph Report.....App. 197

R. Joaquin Fuster's Polygraph Report.....App. 201